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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947

UNITED STATES OF AMERICA, EX REL., HANS ACKERMANN,
Petitioner

VS.

J. L. O'ROURKE, OFFICER IN CHARGE OF ALIEN INTERNMENT CAMP AT CRYSTAL CITY, TEXAS, *Respondent*

UNITED STATES OF AMERICA, EX REL., FRIEDA ACKERMANN,
Petitioner

VS.

J. L. O'ROURKE, OFFICER IN CHARGE OF ALIEN INTERNMENT CAMP AT CRYSTAL CITY, TEXAS, *Respondent*

PETITION FOR WRITS OF CERTIORARI

To the Honorable Supreme Court of the United States:

Your petitioner, United States of America, upon the relations of Hans Ackermann and Frieda Ackermann, relators, prays for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit to bring up for review here the judgments of said court affirming the action of the trial court in granting respondent's

motions for judgments on the pleadings and dismissing writs of habeas corpus theretofore issued pursuant to orders of the judge of the trial court.

SUMMARY STATEMENT OF THE MATTER INVOLVED

These are companion cases and, with the approval of the trial court, it has been stipulated by the parties that the same disposition should be made of both cases. Relators are now in custody of respondent by virtue of orders of the United States Attorney General ordering that they be interned "as being *potentially** dangerous to the public peace and safety of the United States". Prior to and at the time of their arrest, detention and internment they were alien enemies as that term is defined in the Alien Enemy Act of 1798, 50 U.S.C. 21, but at the time of their apprehension, detention and internment they were residing within continental United States. The Attorney General determined the propriety of their *internment,* and such determination was based upon hearings for which they were not furnished with charges against them, at which they were denied the right to be represented by counsel, were not confronted by witnesses against them, were not afforded the opportunity to cross-examine witnesses against them, and the Attorney General having made the charges, heard the evidence, if any, passed upon the sufficiency thereof and judged the matter. No proceeding against them was instituted in any court of the United States to determine the propriety of their internment.

These proceedings were instituted in the trial court

*Throughout this petition emphasis is supplied unless otherwise indicated.

by petitions for habeas corpus and the appeals to the Circuit Court of Appeals were from the action of the trial court in granting respondent's motions for judgments on the pleadings and dismissing writs of habeas corpus theretofore issued pursuant to orders of the judge of said court.

BASIS OF JURISDICTION

The jurisdiction of the Supreme Court is invoked under Section 240 of Judicial Code as amended, 28 U.S.C. 347, Sub-section (a), and Supreme Court rule 38(5)(b).

The trial court's action and the action of the Circuit Court of Appeals in sustaining same present questions of such gravity and importance that the Supreme Court should exercise its jurisdiction to review by certiorari the judgments of the Circuit Court of Appeals. Furthermore, in disposing of these cases, the courts below decided one federal question, necessary to the decision of the cases, in conflict with an applicable decision of this court or decided at least two important questions of federal law which have not been, but should be, settled by this court, and it is submitted that the courts below erred in their decision of each of said federal questions.

The date of the final judgment of the Circuit Court of Appeals in each of these cases and the date on which that court filed its opinion, per curiam, in each of these cases was November 14, 1947. No motion for rehearing was filed in that court and this petition for writs of certiorari is being filed in this court within three months from said date as provided in Section 350 of Title 28, United States Code.

QUESTIONS PRESENTED

(1)

Do relators, although alien enemies, have access to the courts for determining the applicability to these cases of the provisions of the Presidential Proclamation promulgated pursuant to the Alien Enemy Act of 1798 which give the Attorney General power to determine whether certain alien enemies should be interned?

(2)

Do the provisions of the Presidential Proclamation promulgated pursuant to the Alien Enemy Act of 1798 which give the Attorney General power to determine whether certain alien enemies should be interned apply to these cases?

(3)

Did the Attorney General have power or authority to order that relators be interned?

(4)

Did the Attorney General have power or authority to order that relators be interned "as being *potentially* dangerous to the public peace and safety of the United States"?

(5)

Are the Attorney General's actions in ordering that relators be interned subject to attack on the ground that relators have never been given a hearing in accordance with the provision of the Fifth Amendment to the Constitution that *no person* shall be deprived of liberty without due process of law?

REASONS FOR ALLOWANCE OF WRITS

(1)

In granting respondent's motions for judgments on the pleadings and dismissing the writs of habeas corpus theretofore issued, the trial court sustained respondent's contention that whether relators are alien enemies within the statutory definition contained in Title 50, Section 21, United States Code, (Alien Enemy Act) (Appendix A, *infra,* p. 34) is the only triable issue raised by the pleadings, and thus, in effect, held that relators do not have access to the courts for the purpose of determining the applicability to these cases of the provisions of the Presidential Proclamation (2526) (Appendix B, *infra,* pp. 37-40, and Appendix C, *infra,* pp. 41-43) promulgated pursuant to the Alien Enemy Act of 1798 (50 U.S.C. 21, 22, 23 and 24) (Appendix A, *infra,* pp. 34-36) which give the Attorney General power to determine whether certain alien enemies should be *interned.* Such action of the trial court and the action of the Circuit Court of Appeals in sustaining same are directly in conflict with the holding of the Supreme Court in the cases of *Ex parte Quirin* and the other cases decided therewith (the saboteur cases), 317 U.S. 1, 25; 63 S. Ct. 2, 9, wherein it was held that the fact that the saboteurs were enemy aliens did not prevent them from having access to the courts for determination of the applicability to their cases of the Presidential Proclamation involved therein.

(2)

It is the contention of relators that the above mentioned provisions of the Presidential Proclamation promulgated pursuant to the Alien Enemy Act of 1798

which give the Attorney General power to determine whether certain alien enemies should be *interned* do not apply to these cases and the determination of whether or not relators are correct in this contention presents an important question of federal law which has not been, but should be, settled by the Supreme Court, and a correct determination of said question is essential to the decision of these cases.

(3)

It is the contention of relators that the Attorney General did not have power or authority to order that relators be *interned* and such contention presents for determination an important question of federal law which has not been, but should be, settled by the Supreme Court, and a correct determination of said question is essential to the decision of these cases.

(4)

Relators' pleadings clearly show that they have never been given a hearing in accordance with the provision of the Fifth Amendment to the Constitution that *no person* shall be deprived of liberty without due process of law (Hans Ackermann R. 18), and since they contend that the actions of the Attorney General in ordering that they be *interned* are subject to attack on that ground there is presented for determination an important question of federal law which has not been, but should be, settled by the Supreme Court, and a correct determination of said question is essential to the decision of these cases if it should be held that the Attorney General had the power and authority to determine the propriety of *interning* relators.

NOTE

There is annexed hereto a brief which relators respectfully submit conclusively shows that the courts below either held that relators do not have access to the courts for determining the applicability to these cases of the provisions of the above mentioned Presidential Proclamation which give the Attorney General power to determine whether certain alien enemies should be *interned* or committed reversible error in their decision of each of the other questions mentioned above.

PRAYER

Wherefore, your petitioner prays that this honorable court allow this petition for certiorari and grant the writs of certiorari directed to the Circuit Court of Appeals for the Fifth Circuit to bring up the records in these cases here to review the judgments of the District Court for the Western District of Texas and the judgments affirming the same entered by the Circuit Court of Appeals for the Fifth Circuit.

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UNITED STATES OF AMERICA, EX REL., HANS ACKERMANN,
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BRIEF SUPPORTING PETITION FOR CERTIORARI

EXPLANATORY NOTE

The records in these cases are separate and it has been stipulated, with the approval of the trial court, that the pleadings, motions, orders and judgments in

same are identically the same except as to the name of the relator and the number of the case (Frieda Ackermann Record, Page 2). Practically all references to the record will be to the record in the Hans Ackermann case, since the record in the Frieda Ackermann case is greatly abbreviated. References to the Hans Ackermann record will be indicated thus: (R(H) 39), and references to the Frieda Ackermann record will be indicated thus: (R(F) 11).

THE OPINIONS BELOW

The opinions, per curiam, of the Circuit Court of Appeals are set out in the transcripts of the records (R(H) 40 and R(F) 12). So far as known to relators said opinions have not been reported.

BASIS OF JURISDICTION

The jurisdiction of the Supreme Court is invoked under Section 240 of Judicial Code as amended, 28 U.S.C. 347, Sub-section (a), and Supreme Court rule 38(5)(b).

The trial court's action and the action of the Circuit Court of Appeals in sustaining same present questions of such gravity and importance that the Supreme Court should exercise its jurisdiction to review by certiorari the judgments of the Circuit Court of Appeals. Furthermore, in disposing of these cases, the courts below decided one federal question, necessary to the decision of the cases, in conflict with an applicable decision of this court or decided at least two important questions of federal law which have not been, but should be, settled by this court, and it is

submitted that the courts below erred in their decision of each of said federal questions.

The date of the final judgment of the Circuit Court of Appeals in each of these cases and the date on which that court filed its opinion, per curiam, in each of these cases was November 14, 1947. No motion for rehearing was filed in that court and this petition for writs of certiorari is being filed in this court within three months from said date as provided in Section 350 of Title 28, United States Code.

STATEMENT OF THE CASES

These proceedings, for release of relators from internment, were instituted in the trial court by petitions for writs of habeas corpus (R(H) 1-8). The judge of the trial court ordered the issuance of the writs (R(H) 9), which were served on respondent (R(H) 10). He filed returns to which there were attached copies of orders of the Attorney General ordering that relators be *interned* and in which returns respondent asserted that relators were being held by him pursuant to said orders (R(H) 12-13), and thereafter filed amended returns in which he again asserted that relators are *interned* pursuant to orders of the Attorney General, and alleged that the Attorney General acted under authority of Alien Enemy Act of 1798 (50 U.S.C. 21) and Presidential Proclamation 2526 in ordering the *internment* of relators; that they were ordered interned "as being *potentially** dangerous to the public peace and safety of the United States"; and in which he asserted that no question is open to consideration in these proceedings other than whether or not relators

*Throughout this brief emphasis is supplied unless otherwise indicated.

are alien enemies. (R(H) 13-16). Thereafter relators filed traverses in which they assert that the orders of the Attorney General under which they are now *interned* were made without lawful authority; that relators are not subject to Presidential Proclamation 2526; that the Attorney General was not empowered by the Alien Enemy Act of 1798 and said Presidential Proclamation to order their *internment;* that they have not been afforded a fair hearing or due process, nor furnished with the charges against them, nor allowed the right to be represented by counsel at any hearing, nor confronted by witnesses against them, nor afforded the opportunity to cross-examine witnesses against them, nor afforded a hearing before a United States court, nor was any proceeding instituted against them in any court of the United States to determine the propriety of their *internment,* the Attorney General having made the charges, heard the evidence, if any, passed upon the sufficiency thereof and judged the matter; and in which traverses they deny that the only question open to consideration in these proceedings is whether or not they are alien enemies. (R(H) 17-21).

Relators are husband and wife, were born in Germany, came to the United States as legal immigrants at the same time, have resided together in Texas ever since they arrived in this country (R(F) 2), have been law-abiding residents ever since they arrived in the United States (R(H) 21), were arrested and placed under restraint in Alien Detention Station, Seagoville, Texas, on the same day, thereafter were transferred to Alien Internment Camp at Crystal City, Texas, where they are now in custody of respondent by virtue of the above mentioned orders of the Attorney General ordering that they be *interned,* such orders being dated April 29, 1944 (R(F) 2).

Respondent filed motions for judgments on the pleadings, the basis of such motions being that the only triable issue raised by the pleadings is whether the relators are alien enemies within the statutory definition contained in Title 50, Section 21 of the United States Code (Appendix A, *infra,* p. 34) and since relators are alien enemies as defined in said Section 21, respondent is entitled to judgments on the pleadings (R(H) 27-28), and the trial court granted said motions and entered judgments that the writs of habeas corpus be, and the same were thereby, dismissed (R(H) 29).

SPECIFICATION OF ERRORS RELIED UPON

The errors relied upon are the errors of the District Court in granting respondent's motions for judgments on the pleadings and dismissing the writs of habeas corpus theretofore issued pursuant to orders of the judge of said court and the errors of the Circuit Court of Appeals in affirming such actions of the District Court, each of said courts thereby either erroneously holding that relators do not have access to the courts for determining the applicability to these cases of the provisions of the Presidential Proclamation and Regulations (Appendices B and C, *infra,* pp. 37-43) promulgated pursuant to the Alien Enemy Act of 1798 (Appendix A, *infra, pp.* 34-36) which give the Attorney General power to determine whether *certain* alien enemies should be *interned,* or erroneously holding (1) that said provisions of said Presidential Proclamation apply to these cases, (2) that the Attorney General had power and authority to order that relators be *interned,* (3) that the Attorney General had power and authority to order that relators be interned "as being *potentially* dangerous to the public peace and

safety of the United States", and (4) that the Attorney General's actions in ordering that relators be *interned* are not subject to attack on the ground that relators have never been given a hearing in accordance with the provision of the Fifth Amendment to the Constitution that *no person* shall be deprived of liberty without due process of law.

SUBHEADS OF ARGUMENT AND POINTS ARGUED

(1) Questions presented and holdings of courts below.

(2) Provisions of Presidential Proclamations and regulations the applicability of which is denied.

(3) Relators have access to the courts for determining the applicability to these cases of the provisions of the Presidential Proclamation promulgated pursuant to the Alien Enemy Act of 1798 which give the Attorney General power to determine whether *certain* alien enemies should be *interned.* (Germane to first question presented.)

(4) The proclamations and regulations promulgated by the President pursuant to Section 21, Title 50, United States Code, did not give the Attorney General power or authority to order the internment of alien enemies (German) residents of and found within the continental United States at the time of their apprehension, and since relators were residents of and actually in the continental United States at the time they were apprehended, such proclamations and regulations do not apply to them so far as ordering that they be *interned* is concerned and, therefore, the Attorney

General did not have jurisdiction, power or authority to order that they be *interned*. (Germane to second and third questions presented.)

(5) The Attorney General did not have power or authority to order that relators be interned "as being *potentially* dangerous to the public peace and safety of the United States". (Germane to fourth question presented.)

(6) It not being necessary for the public peace and safety of the United States for relators to be *interned* without being given a hearing in accordance with the provision of the Fifth Amendment to the Constitution that *no person* shall be deprived of liberty without due process of law, the Attorney General's action in ordering that they be interned is subject to attack on the ground that they have never been given such hearing, and since they have never been given such hearing, either judicial or administrative, their internment is illegal. (Germane to fifth question presented.)

ARGUMENT

(1)

Questions presented and holdings of courts below.

The pertinent portions of the records in these cases are stated in the statement of the cases hereinabove set out. Such statement shows that the pleadings clearly present the questions of (1) whether or not relators have access to the courts for determining the applicability to these cases of the provisions of the Presidential Proclamation promulgated pursuant to the Alien Enemy Act of 1798 which give the Attorney General power to determine whether *certain* alien enemies

should be *interned,* (2) whether or not the provisions of the Presidential Proclamation promulgated pursuant to the Alien Enemy Act of 1798 which give the Attorney General power to determine whether *certain* alien enemies should be *interned* apply to these cases, (3) whether or not the Attorney General had power or authority to order that relators be *interned,* (4) whether or not the Attorney General had power or authority to order that relators be interned "as being *potentially* dangerous to the public peace and safety of the United States", and (5) whether or not the Attorney General's actions in ordering that relators be interned is subject to attack on the ground that relators have never been given a hearing in accordance with the provision of the Fifth Amendment to the Constitution that *no person* shall be deprived of liberty without due process of law.

Therefore, it cannot be reasonably contended that the trial court's action in granting respondent's motions for judgments on the pleadings and the action of the Circuit Court of Appeals in sustaining such action of the trial court do not conclusively show that both of said courts held exactly as indicated in the foregoing specification of errors relied upon. Respondent asserted in his amended returns to the writs of habeas corpus that no question is open for consideration in these proceedings other than whether or not relators are alien enemies, and in his motions for judgments on the pleadings the only grounds which he attempted to allege for granting said motions were (1) that the only triable issue raised by the pleadings is whether relators are alien enemies within the statutory definition contained in Title 50, Section 21, United States Code, and as a matter of law they are

alien enemies within said statutory definition, and (2) that relators have failed to state a claim upon which relief can be granted. Since, if relators have access to the courts for determination of whether or not the proclamation and regulations in question apply to them, their pleadings clearly stated more than one claim for relief, the only logical conclusion that can be reached from the fact that the trial court granted said motions and the Circuit Court of Appeals sustained such action is that both of those courts held that relators do not have access to the courts for determining the applicability to these cases of the provisions of the Presidential Proclamation in question.

However, if it should be held that the courts below did not hold as indicated above with respect to the question of access to the courts, then it must be admitted that those courts, in granting and upholding the granting of respondent's motions for judgments on the pleadings, held as stated in subdivisions (1), (2), (3) and (4) in the above specification of errors relied upon. In the argument herein relators will first assume that the courts below held as contended above with respect to the question of access to the courts and then proceed under the assumption that said courts held as stated in the above mentioned subdivisions of the above specifications of errors relied upon.

(2)

Provisions of Presidential Proclamations and regulations the applicability of which is denied.

Relators do not attack the validity of Section 21, Title 50, United States Code, or any other portion of the Alien Enemy Act of 1798; nor do they attack the

validity of any proclamation or regulations promulgated by the President pursuant to said Act; nor do they deny that the President had the power to delegate to the Attorney General any power possessed by the President under said Act; and particularly they do not deny the power and right of the President to delegate to the Attorney General the power and authority to determine the propriety of internment and to order the internment of any alien enemy whether within or without the continental United States. Relators do not contend that the Attorney General was not given the power and authority under Presidential Proclamation 2526 and regulations thereunder to apprehend and detain alien enemies, resident of and actually within the continental United States, but relators do contend and will show in this argument that under said Presidential Proclamation and regulations the Attorney General was not given the power or authority to *determine the propriety of internment* or to *order the internment* of alien enemies, resident of and actually within the continental United States at the time of their apprehension or arrest.

(3)

Relators have access to the courts for determining the applicability to these cases of the provisions of the Presidential Proclamation promulgated pursuant to the Alien Enemy Act of 1798 which give the Attorney General power to determine whether CERTAIN alien enemies should be INTERNED. (Germane to first question presented.)

The fact that this contention of relators should be decided in their favor has been definitely settled by the Supreme Court in the case of *Ex Parte Quirin* and

other cases decided therewith (the saboteur cases), 317 U.S. 1, 25; 63 S. Ct. 2, 9, wherein it was held that alien enemies, although saboteurs, had access to the courts for determination of the applicability to their cases of the proclamation involved therein.

(4)

The proclamations and regulations promulgated by the President pursuant to Section 21, Title 50, United States Code, did not give the Attorney General power or authority to order the internment of alien enemies (German) residents of and found within the continental United States at the time of their apprehension, and since relators were residents of and actually in the continental United States at the time they were apprehended, such proclamations and regulations do not apply to them so far as ordering that they be INTERNED is concerned and, therefore, the Attorney General did not have jurisdiction, power or authority to order that they be INTERNED. (Germane to second and third questions presented.)

This point and the next succeeding point being closely related, they are presented together in the argument under the next succeeding point.

(5)

The Attorney General did not have power or authority to order that relators be interned "as being POTENTIALLY dangerous to the public peace and safety of the United States". (Germane to fourth question presented.)

For the purpose of emphasizing the statements made in this argument and for the purpose of making it con-

venient for the court to determine the correctness of relator's contentions, there are set out at the back of this brief appendices wherein the pertinent sections of the Alien Enemy Act of 1798 (Appendix A, pp. 34-36), Presidential Proclamation 2526 (Appendix B, pp. 37-40), the pertinent regulations adopted by said Presidential Proclamation (Appendix C, pp. 41-43) and Presidential Proclamation 2655 (Appendix D, pp. 44-45). It will be noted that throughout these appendices emphasis has been supplied by italicizing certain words and clauses.

Section 21 of Title 50, United States Code, shows on its face that it was enacted for the purpose of making it possible for the President to do the things found *necessary "for the public safety"*, and it authorizes him to direct *"the manner and degree of the restraint"* to which alien enemies shall be subject. Proclamation 2526 delegates certain powers to the Attorney General and Secretary of War with respect to conduct toward German alien enemies and clearly states therein that their acts must be done in conformity with the regulations duly promulgated by the President. Said proclamation provides that the regulations contained in Proclamation No. 2525 of December 7, 1941, relative to Japanese alien enemies "are hereby incorporated in and made a part of this proclamation, and shall be applicable to alien enemies defined in this proclamation". Such regulations so incorporated in said proclamation are the only regulations issued by the President under which the Attorney General had any authority whatever to (1) apprehend, (2) detain or (3) intern any alien enemy. These regulations make it clear that there are three distinct and separate steps or phases in the handling of alien enemies, to-wit: (1)

apprehension or arrest, (2) detention and (3) internment. In other words, there is a clear distinction between "detention" and "internment". The regulations in question give to the Attorney General and Secretary of War power and authority to deal with alien enemies in certain areas, and such areas are of two general classifications, one being the territory within the continental United States and the other being territory under the jurisdiction of the United States located outside of the continental United States. The regulations make it unmistakably clear that the power of such officers to *intern* alien enemies applies only to the territory outside of the continental United States and that the power of the Attorney General, insofar as dealing with alien enemies found within the continental United States is concerned, is to (1) arrest them, (2) designate places of detention for them and (3) prescribe *permits* for them. He does not have and has never had under said regulations power to *intern* any alien enemy who was a resident of and actually within the continental United States at the time of his or her apprehension, much less intern one as being *potentially* dangerous to the public peace and safety of the United States.

Section 21, Title 50, U.S. Code, gives the President broad discretion in the exercise of his power to direct the conduct to be observed, on the part of the United States, toward aliens who become liable as alien enemies, but such power is limited to whatever is *necessary* to accomplish the purpose of the Act, Alien Enemy Act of 1798, and it is clear that the purpose of the Act is to make provision *"for the public safety"*. At no time since Japan made its attack on Pearl Harbor, which immediately preceded the making of the procla-

mations and regulations in question, has there been any reason to believe there was any likelihood that the courts mentioned in Section 23 of the Act, the United States courts having criminal jurisdiction, and the "several justices and judges of the courts of the United States", within the continental United States, would not be available, upon complaint against an alien enemy resident and at large within the continental United States, to accord a "full examination and hearing on such complaint" and dispose of such alien enemy conformably to the provisions of the Act. On the other hand, there were good and sufficient reasons to believe that conditions in the territory under the jurisdiction of the United States located outside of the continental United States would be such that the likelihood of obtaining orderly judicial hearings would be very remote.

Undoubtedly the President had the above mentioned conditions, existing and prospective, in mind at the time he issued the proclamations and regulations quoted above. In the light of such conditions he complied with the letter and spirit of the mandate of the Act that he make all *necessary* provision "for the public safety". The public safety within the continental United States merely required that the Attorney General have power and authority only to (1) apprehend or arrest alien enemies deemed *dangerous* (not *potentially* dangerous), (2) designate "*places of detention*" for them and (3) prescribe *permits* for them; but outside of the continental United States the public safety required that he and the Secretary of War have more and greater powers and authority.

The proclamation in question (2526) clearly limits the powers and authority of the Attorney General to

acts necessary to carrying out the regulations promulgated by the President. In other words, one must examine the regulations made a part of such proclamation in order to determine the powers and authority of the Attorney General and the officers acting under him, as well as the powers and authority of the Secretary of War and the officers acting under him.

The first regulation (Appendix C, *infra,* p. 41) provides for the public safety in the Canal Zone, the Hawaiian Islands and the Philippine Islands, and specifically states that alien enemies may be (1) *apprehended* and (2) *detained* until it is determined, under regulations prescribed by the Secretary of War, whether they should be (3) *interned,* following which such alien enemy "shall either be released, released on bond, or permanently interned, as the case may be."

The second regulation (Appendix C, *infra,* p. 42) provides that power of (1) *arrest,* (2) *detention* and (3) *internment* of alien enemies in the Canal Zone, the Hawaiian Islands and the Philippine Islands shall be exercised under regulations prescribed by the Secretary of War.

The third regulation (Appendix C, *infra,* p. 42) provides for the handling of alien enemies in Alaska, Puerto Rico and the Virgin Islands and provides that those violating regulations prescribed by the Attorney General shall be (1) *apprehended* by the authority of the Attorney General acting through the United States Attorney in each such territory and (2) *detained* until it is *determined under regulations prescribed by the Attorney General* whether such alien enemy shall be (3) released, released on bond, or permanently *interned,* as the case may be.

It will be seen from the above that, so far as certain specified territory outside of the continental United States is concerned, the Attorney General and Secretary of War and the officers acting under them respectively are specifically and in clear and decisive language given authority to determine the propriety of interning alien enemies.

So far as the regulations are concerned, the seventh regulation (Appendix C, *infra,* p. 42) is the only one which gives the Attorney General any power or authority with respect to alien enemies residing and apprehended within the continental United States. It does not expressly give him power or authority to do anything more than (1) see that alien enemies whom he deems to be *dangerous* (not *potentially* dangerous) to the public peace or safety of the United States are *apprehended or arrested,* (2) designate places of *detention* for them and (3) prescribe *permits* for them. When construed in the light of all of the other regulations, the seventh regulation is not susceptible of a construction which justifies a conclusion that the President delegated or intended to delegate to the Attorney General the power or authority to determine the propriety of interning an alien enemy resident of the continental United States. In the light of the fact that the President, in the first regulation, expressly and clearly gave the Secretary of War such authority with respect to certain territories outside of the continental United States and the fact that the President, in the third regulation, expressly and clearly gave the Attorney General such authority with respect to certain other territories outside of the continental United States, the conspicuous failure of the President to expressly give the Attorney General such authority with

respect to the continental United States clearly shows that the President did not intend to delegate to the Attorney General the power or authority to determine the propriety of interning any resident alien enemy who was apprehended within the continental United States.

The word "internment" appears only one time in said seventh regulation and it is there used as descriptive of the officers who shall designate the place of detention of alien enemies who have been arrested. Such officers are there designated as "the officers responsible for the execution of these regulations and for the arrest, detention and *internment* of alien enemies in each case". Such use of the word "internment" in nowise confers power upon anyone to *intern* alien enemies.

In the light of Sections 23 and 24 of the Act (Appendix A, *infra,* pp. 35-36) and the above discussed regulations, the proclamation in question (2526) clearly shows that the President intended that the United States courts and the several justices and judges thereof should have the exclusive power and authority to determine the propriety of interning alien enemies so far as those residing and apprehended within the continental United States are concerned and that the Attorney General and Secretary of War should have the power and authority to determine the propriety of interning only alien enemies apprehended in the territories of the United States located outside of the continental United States. Section 23 makes it the duty of United States courts having criminal jurisdiction and "the several justices and judges of the courts of the United States", upon complaint against any alien

enemy *resident* and at large within such jurisdiction or district, to the *danger* of the public peace or safety *"and contrary to the tenor or intent of such proclamation, or other regulations which the President may have established"*, to cause such alien to be duly apprehended and conveyed before such court, judge or justice for a "full examination and hearing on such complaint", and dispose of such alien *"conformably to the proclamation or regulations established as aforesaid"*. Throughout the proclamation it refers to the "sections" of the Act and expressly provides that "all alien enemies shall be liable to restraint, or to give security, or to remove and depart from the United States in the manner prescribed *by sections 23 and 24* of Title 50 of the United States Code, and as *prescribed in the regulations duly promulgated by the President*".

The language used by the President, in said proclamation and the regulations in question, clearly shows that so far as the *internment* of alien enemies is concerned he intended for the procedure for which provision is made in sections 23 and 24 to be exclusively employed with respect to the continental United States and the procedure for which provision is made in said regulations to be employed only in the territories of the United States located outside of the continental United States. It cannot be logically contended that the President's language quoted in the last sentence of the last preceding paragraph hereof gave the Attorney General power to do all of the things enumerated in such quoted provision. The things enumerated therein include liability of such alien enemies "to remove and depart from the United States". The fact that the President found it necessary to promulgate Proclamation 2655 (Appendix D, *infra*, pp. 44-45) author-

izing the Attorney General to order the removal of alien enemies from the contiental United States refutes any contention that such power was given him by the proclamation in question (2526). It is just as reasonable to contend that said proclamation gave him power to remove alien enemies as it is to contend that said proclamation gave him power to *intern* them. Therefore, there is nothing in Proclamation 2526 which gave the Attorney General power to determine the propriety of the *internment* of alien enemies who reside and are apprehended within continental United States.

The fact that Proclamation 2655, *supra,* authorizes the Attorney General to order alien enemies "now or hereafter *interned* within the continental limits of the United States" removed from the United States does not indicate that the President recognizes the validity of any order of the Attorney General ordering the internment of alien enemies who were residents of and actually within the continental United States at the time of their apprehension. Undoubtedly the Attorney General and Secretary of War with respect to territories of the United States located outside of the continental United States and the courts, justices and judges with respect to the continental United States had the power and did cause numerous alien enemies to be interned, and the Attorney General and Secretary of War, in the exercise of their authority to designate places of detention, had the right to cause such internees to be brought from such outside territories into the continental United States for internment therein and certainly all alien enemies interned in accordance with the procedure mentioned in sections 23 and 24 were interned in the continental United States if they were residents of and actually in the continental

United States at the time of their apprehension. Therefore, it must be assumed that the President referred to such lawfully interned alien enemies when he issued said proclamation authorizing the Attorney General to remove those "interned within the continental limits of the United States".

What has been said above clearly shows that the provisions of the proclamation and regulations in question do not apply to relators so far as their *internment* is concerned.

It is so obvious that the Attorney General did not have the right or power to intern any alien enemy as being "*potentially* dangerous to the public peace and safety of the United States" that further argument with respect to such question is deemed unnecessary. Even if the Attorney General had the power to determine the propriety of the internment of relators, their internment is illegal because he ordered that they be interned on the ground that they were *potentially* dangerous instead of *dangerous*.

(6)

It not being necessary for the public peace and safety of the United States for relators to be INTERNED without being given a hearing in accordance with the provision of the Fifth Amendment to the Constitution that NO PERSON shall be deprived of liberty without due process of law, the Attorney General's action in ordering that they be interned is subject to attack on the ground that they have never been given such hearing, and since they have never been given such hearing, either judicial or adminis-

trative, their internment is illegal. (Germane to fifth question presented.)

As shown above in the statement of the cases, relators were ordered interned without their being afforded a fair hearing or due process, they not having been furnished with the charges against them, having been denied the right to be represented by counsel, not having been confronted by witnesses against them, not having been afforded the opportunity to cross-examine witnesses against them, and the Attorney General having made the charges, heard the evidence, passed upon the sufficiency thereof and judged the matter.

They were born in Germany and were married there in 1923, came to the United States as legal immigrants in 1925, settled in Texas and have resided in Texas since their arrival in this country (R(H) 2), since their arrival in the United States have been law-abiding *residents* (R(H) 5), and were at large during actual hostilities between Germany and the United States (R(H) 5).

As shown in the argument under the foregoing points, the Attorney General had power and authority to cause the *arrest* of relators and *detain* them until the propriety of their internment could be determined. Such power and authority on his part was sufficient to protect the public peace and safety of the United States. Therefore, there was no necessity for him to order that they be interned without giving them a hearing consistent with the requirement of the Fifth Amendment to the Constitution.

The Fifth Amendment to the Constitution says: "No person shall * * * be deprived of life, liberty or

property without due process of law". Obviously there is no exception in favor of the war power of government nor against enemy aliens in that article of amendment. The principal requisite for a person to qualify for these rights or any other of the substantive freedoms provided for under our Constitution is *residence* and this qualification relators, as shown above, admittedly have.

In *Bridges* vs. *Wixon,* 326 U.S. 135, the Supreme Court held that *residence* was the only necessary requirement by which a person became vested with Constitutional rights and other substantive freedoms of our federal Constitution, and said on page 154:

> "But we are dealing here with deportation of aliens whose roots may have become, as they are in the present case, deeply fixed in this land."

Mr. Justice Murphy in a concurring opinion condemning the statute on deportation there involved, stated the point very emphatically on pages 161 and 162 as follows:

> "The power to exclude and deport aliens is one springing out of the inherent sovereignty of the United States. *Chinese Exclusion Case,* 130 U.S. 581. Since an alien obviously brings with him no constitutional rights, Congress may exclude him in the first instance for whatever reason it sees fit. *Turner* v. *Williams,* 194 U.S. 279. The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. *But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders.* Such rights include those protected by the First and the Fifth Amendments and by

the due process clause of the Fourteenth Amendment. None of these provisions acknowledge any distinction between citizens and *resident* aliens. They extend their inalienable privileges to *all 'persons'* and guard against any encroachment on those rights by federal or state authority. Indeed, this Court has previously and expressly recognized that Harry Bridges, the alien, possessed the right to free speech and free press, and that the Constitution will defend him in the exercise of that right. *Bridges* v. *California,* 314 U.S. 252.

"Since *resident* aliens have constitutional rights it follows that Congress may not ignore them in the exercise of its 'plenary' power of deportation. As this Court said in a previous exclusion case, 'But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in "due process of law" as understood at the time of the adoption of the Constitution.' *Japanese Immigrant Case,* 189 U.S. 86, 100. No less may a statute on its face disregard the basic freedoms that the Constitution guarantees to *resident* aliens. The Chief Justice, in his dissenting opinion in *Jones* v. *Opelika,* 316 U.S. 584, 609, has stated that 'The First Amendment prohibits all laws abridging freedom of press and religion, not merely some laws or all except tax laws'. By the same token, the First Amendment and other portions of the Bill of Rights make no exception in favor of deportation laws or laws enacted pursuant to a 'plenary' power of the Government. Hence the very provisions of the Constitution negative the proposition that Congress, in the exercise of a 'plenary' power, may override the rights of those who are numbered among the beneficiaries of the Bill of Rights".

Thus any decision which says that *resident* enemy aliens are not entitled to due process of law is in error by virtue of the fact that it suffers from an unwarranted emphasis upon the word "enemy" and complete neglect of the word *"resident"*. Rightly conceived the latter is the important word in considering the question and the word which entitles all *resident* aliens and *resident* enemy aliens as well to due process of law, the same as citizens.

In violation of their constitutional right to due process under the Fifth Amendment to the Constitution, relators have never received a fair hearing at any time, before or after, the Attorney General ordered that they be interned. In *Bridges* vs. *Wixon, supra,* the Supreme Court held that due process of law and a fair hearing must be given *resident* aliens and held that such a resident alien might be released on habeas corpus where he did not receive such a fair hearing.

It is true that Section 21 of the Act does not expressly require that the President shall accord a hearing to an alien enemy before ordering his internment, but it is respectfully submitted that the language of said section when construed in connection with Sections 22, 23 and 24, of the Act and in the light of the constitutional history of this country, leaves no doubt that a hearing is a jurisdictional prerequisite to a valid internment order where *residents* are involved.

There simply is no such thing as a valid deprivation of life, liberty or property under the American constitutional system without according the party affected a fair hearing, either in times of peace or in times of war, regardless of whether the party is a friend or a foe, a citizen or the national of a hostile power. *St.*

Joseph Stockyards Company v. *United States,* 298 U.S. 38, 52.

The courts will construe a Legislative Enactment that deals with the liberty or other basic rights of an individual, as requiring a fair hearing in order to prevent absurd results. *Lau Ow Bew* v. *U. S.,* 144 U.S. 47, 59; *Sorrels* v. *U. S.,* 287 U.S. 435, 447.

As hereinabove pointed out, the sole purpose of the sections of the Alien Enemy Act involved in these proceedings and the proclamations and regulations promulgated thereunder by the President was to make necessary provision for the "public peace and safety of the United States". In order to accomplish this purpose, insofar as the continental United States was and is concerned, there has never been any necessity to order that any *resident* alien enemy be *interned* without according him a fair hearing in accordance with the provision of the Fifth Amendment to the Constitution that *no person* shall be deprived of liberty without due process of law; and courts will restrict the application of plenary powers (even the war power) of government where it is in unwarranted conflict with vested constitutional rights of *persons* within our borders. *Ex parte Endo,* 323 U.S. 283, 302 and 308.

CONCLUSION

In conclusion it is submitted that the provisions of the proclamation and regulations giving the Attorney General power to order that *certain* alien enemies be *interned* are not applicable in these cases and therefore the Attorney General had no right or power to issue the orders ordering that relators be *interned;*

that there is no authority under the Alien Enemy Act or the proclamations and regulations promulgated by the President thereunder for the internment of relators as being *potentially* dangerous to the public peace and safety of the United States; and that relators are interned in derogation of their constitutional rights as *residents* of the United States, and the attempted exercise of plenary powers by the government was and is wholly unwarranted by reason of the fact that it was and is not necessary for the public peace and safety of the United States for relators to be *interned* without being accorded a fair hearing in accordance with the provision of the Fifth Amendment to the Constitution that *no person* shall be deprived of liberty without due process of law.

Wherefore, it is respectfully suggested that in the interests of justice the writs of certiorari should be granted.

All of which is respectfully submitted.

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APPENDIX A

The following sections of the Alien Enemy Act of 1798 (R.S. Secs. 4067, 4068, 4069 and 4070, 50 U.S.C. 21, 22, 23 and 24) are as follows:

Sec. 21. Restraint, regulation and removal.

Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; *the manner and degree of restraint** to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found *necessary* in the premises *and for the public safety* (R. S. Sec. 4067; Apr. 16, 1918, ch. 55, 40 Stat. 531).

*All emphasis supplied.

Sec. 22. Time allowed to settle affairs and depart.

When an alien who becomes liable as an enemy, in the manner prescribed in the preceding section, is not chargeable with actual hostility, or other crime against the public safety, he shall be allowed, for the recovery, disposal, and removal of his goods and effects, and for his departure, the full time which is or shall be stipulated by any treaty then in force between the United States and the hostile nation or government of which he is a native, citizen, denizen, or subject; and where no such treaty exists, or is in force, the President may ascertain and declare such reasonable time as may be consistent with the public safety, and according to the dictates of humanity and national hospitality (R. S. Sec. 4068).

Sec. 23. Jurisdiction of United States courts and judges.

After any such proclamation has been made, the several courts of the United States, having criminal jurisdiction, and the several justices and judges of the courts of the United States, are authorized and it shall be their duty, upon complaint against any alien enemy *resident* and at large within such jurisdiction or district, to the *danger* of the public peace or safety, and contrary to the tenor or intent of such proclamation, or other regulations which the President may have established, to cause such alien to be duly apprehended and conveyed before such court, judge, or justice; and after a full examination and hearing on such complaint, and sufficient cause appearing, to order such alien to be removed out of the territory of the United States, or to give sureties for his good behavior, or to be otherwise restrained, conformably to the proc-

lamation or regulations established as aforesaid, and to imprison, or otherwise secure such alien until the order which may be so made shall be performed (R. S. Sec. 4069).

Sec. 24. Duties of marshals.

When an alien enemy is required by the President, or by order of any court, judge, or justice, to depart and to be removed, it shall be the duty of the marshal of the district in which he shall be apprehended to provide therefor and to execute such order in person, or by his deputy or other discreet person to be employed by him, by causing a removal of such alien out of the territory of the United States; and for such removal the marshal shall have the warrant of the President, or of the court, judge, or justice ordering the same, as the case may be (R. S. Sec. 4070).

APPENDIX B

A Proclamation (2526) by the President of the United States of America

AUTHORITY

Whereas it is provided by section 21 of title 50 of the United States Code as follows:

Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized in any such event, by his proclamation thereof or other public act, to direct the conduct to be observed, on the part of the United States toward the aliens who become so liable; *the manner and degree of the restraint** to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found *necessary* in the premises *and for the public safety.*

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*All emphasis supplied.

And whereas by sections 22, 23, and 24 of title 50 of the United States Code further provision is made relative to alien enemies.

PROCLAMATION

Now, therefore, I, Franklin D. Roosevelt, as President of the United States and as Commander in Chief of the Army and Navy of the United States, do hereby make public proclamation to all whom it may concern that an invasion or predatory incursion is threatened upon the territory of the United States by Germany.

CONDUCT TO BE OBSERVED BY ALIEN ENEMIES

And, acting under and by virtue of the authority vested in me by the Constitution of the United States and the said *sections* of the United States Code, I do hereby further proclaim and direct that the conduct to be observed on the part of the United States toward all natives, citizens, denizens or subjects of Germany being of the age of fourteen years and upwards who shall be within the United States or within any territories in any way subject to the jurisdiction of the United States and not actually naturalized, who for the purpose of this Proclamation and under such *sections* of the United States Code are termed alien enemies, shall be as follows:

All alien enemies are enjoined to preserve the peace towards the United States and to refrain from crime against the public safety, and from violating the laws of the United States and of the States and Territories thereof; and to refrain from actual hostility or giving information, aid or comfort to the enemies of the United States or interfering by word or deed with the

defense of the United States or the political processes and public opinions thereof; and to comply strictly with the regulations which are hereby or which may be from time to time promulgated by the President.

All alien enemies shall be liable to restraint, or to give security, or to remove and depart from the United States in the manner prescribed *by sections 23 and 24* of title 50 of the United States Code, and as prescribed *in the regulations duly promulgated by the President.*

DUTIES AND AUTHORITY OF THE ATTORNEY GENERAL AND THE SECRETARY OF WAR

And, pursuant to the authority vested in me, I hereby charge the Attorney General with the duty of executing all the *regulations hereinafter prescribed* regarding the conduct of alien enemies within continental United States, Puerto Rico, the Virgin Islands and Alaska, and the Secretary of War with the duty of executing the regulations which are hereinafter prescribed and which may be hereafter adopted regarding the conduct of alien enemies in the Canal Zone, the Hawaiian Islands and the Philippine Islands. Each of them is specifically directed to cause the *apprehension* of such alien enemies as in the judgment of each are subject to apprehension or deportation *under such regulations.* In carrying out *such regulations* within the continental United States, Puerto Rico, the Virgin Islands and Alaska, the Attorney General is authorized to utilize such agents, agencies, officers and departments of the United States and of the several states, territories, dependencies and municipalities thereof and of the District of Columbia as he may select for the purpose. Similarly the Secretary of War *in carrying out such regulations* in the Canal Zone, the

Hawaiian Islands and the Philippine Islands is authorized to use such agents, agencies, officers and departments of the United States and of the territories, dependencies and municipalities thereof as he may select for the purpose. All such agents, agencies, officers and departments are hereby granted full authority for all acts done by them *in the execution of such regulations* when acting by direction of the Attorney General or the Secretary of War, as the case may be.

REGULATIONS

The regulations contained in Proclamation No. 2525 of December 7, 1941, relative to natives, citizens, denizens, or subjects of Japan are hereby incorporated in and made a part of this proclamation, and shall be applicable to alien enemies defined in this proclamation.

This proclamation and the regulations herein prescribed shall extend and apply to all land and water, continental or insular, in any way within the jurisdiction of the United States.

In witness whereof, I have hereunto set my hand and cause the seal of the United States of America to be affixed.

Done at the City of Washington this 8th day of December, in the year of our Lord nineteen hundred and forty-one, and of the Independence of the United States of America the one hundred and sixty-sixth.

By the President:

Secretary of State. (6 F. R. 6323)

APPENDIX C

Regulations 1, 2, 3, 4 and 7 of the regulations in Presidential Proclamation 2525 which the President made a part of Presidential Proclamation 2526 by reference are as follows:

REGULATIONS

And, pursuant to the authority vested in me, I hereby declare and establish the following regulations which I find *necessary in the premises and for the public safety:**

(1) No alien enemy shall enter or be found within the Canal Zone and no alien enemy shall enter or leave the Hawaiian Islands or the Philippine Islands except under such regulations as the Secretary of War shall from time to time prescribe. Any alien enemy found in the Canal Zone, the Hawaiian Islands, or the Philippine Islands in violation of any such regulations and any alien enemy who enters or is found within any restricted area to be hereafter prescribed by the Military Commanders of each such territory in the Canal Zone, the Hawaiian Islands, and the Philippine Islands, may be immediately *apprehended* by authority of the Military Governors in each such territory, or if there be no Military Governor, then by authority of the Secretary of War, and *detained* until it is determined, under the regulations to be prescribed by the Secretary of War, whether any such alien enemy should be permanently *interned* following which such alien enemy shall either be released, released on bond, or permanently interned, as the case may be.

*All emphasis supplied.

(2) The exercise of the power to prescribe restricted areas and the power of *arrest, detention* and *internment* of alien enemies in the Canal Zone, the Hawaiian Islands or the Philippine Islands shall be under the jurisdiction of the Military Commanders of each such territory, each acting under such regulations as the Secretary of War shall hereafter prescribe.

(3) No alien enemy shall enter or leave Alaska, Puerto Rico or the Virgin Islands except under such regulations as the Attorney General shall from time to time prescribe. Any alien enemy found in Alaska, Puerto Rico or the Virgin Islands in violation of any such regulations and any alien enemy who enters or is found within any restricted area to be hereafter prescribed by the Military Commanders of each such territory in Alaska, Puerto Rico and by the Naval Commander in the Virgin Islands, shall be immediately *apprehended* by the authority of the Attorney General acting through the United States Attorney in each such territory and *detained* until it is determined, under the regulations to be prescribed by the Attorney General, whether any such alien enemy shall either be released, released on bond, or permanently *interned,* as the case may be.

(4) The Military Commanders in Alaska and Puerto Rico and the Naval Commander in the Virgin Islands shall have power to prescribe restricted areas.

* * *

(7) Alien enemies deemed *dangerous* to the public peace or safety of the United States by the Attorney General or the Secretary of War, as the case may be, are subject to *summary apprehension.* Such *apprehen-*

sion shall be made in the continental United States, Alaska, Puerto Rico and the Virgin Islands by such duly authorized officer of the Department of Justice as the Attorney General may determine. In the Canal Zone, the Hawaiian Islands and the Philippine Islands, *such arrests* shall be made by the Military Commanders in each such territory by authority of the respective Military Governors thereof, and if there be no Military Governor, then by authority of the Secretary of War. Alien enemies *arrested* shall be subject to confinement in such *place of detention* as may be directed by the officers responsible for the execution of these regulations and for the arrest, detention and internment of alien enemies in each case, or in such other places of detention as may be directed from time to time by the Attorney General, with respect to continental United States, Alaska, Puerto Rico and the Virgin Islands, and by the Secretary of War with respect to the Canal Zone, the Hawaiian Islands and the Philippine Islands, and there confined until he shall have received such *permit* as the Attorney General or the Secretary of War with respect to the Canal Zone, the Hawaiian Islands and the Philippine Islands shall prescribe. (6 F. R. 6321)

APPENDIX D

PROCLAMATION 2655

REMOVAL OF ALIEN ENEMIES BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

WHEREAS section 4067 of the Revised Statutes of the United States (50 U.S.C. 21) provides:

[Said section is here set out in full.]

WHEREAS sections 4058, and 4070 of the Revised Statutes of the United States (50 U.S.C. 22, 23, 24) make further provision relative to alien enemies:

WHEREAS the Congress by joint resolutions approved by the President on December 8 and 11, 1941, and June 5, 1942, declared the existence of a state of war between the United States and the Governments of Japan, Germany, Italy, Bulgaria, Hungary, and Rumania;

WHEREAS by Proclamation No. 2525 of December 7, 1941, Proclamations Nos. 2526 and 2527 of December 8, 1941, Proclamation No. 2533 of December 29, 1941, Proclamation No. 2537 of January 14, 1942, and Proclamation No. 2563 of July 17, 1942, the President prescribed and proclaimed *certain regulations** governing the conduct of alien enemies; and

WHEREAS I find it necessary in the interest of national defense and public safety *to prescribe regulations additional and supplemental to such regulations;*

---

*All emphasis supplied.

NOW, THEREFORE, I, Harry S. Truman, President of the United States of America, acting under and by virtue of the authority vested in me by the Constitution of the United States and the aforesaid *sections* of the Revised Statutes of the United States, do hereby prescribe and proclaim *the following regulations,* additional and supplemental to those prescribed by the aforesaid proclamations:

All alien enemies now or hereafter *interned* within the continental limits of the United States *pursuant to the aforesaid proclamations* of the President of the United States who shall be deemed by the Attorney General to be *dangerous* to the public peace and safety of the United States because they have adhered to the aforesaid enemy governments or to the principles of government thereof shall be subject upon the order of the Attorney General to removal from the United States and may be required to depart therefrom in accordance with such regulations as he may prescribe.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this 14th day of July in the year of our Lord nineteen hundred and forty-five and of the Independence of the United States of America the one hundred and seventieth.

By the President:

Secretary of State. (10 F. R. 8947)

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 584

UNITED STATES EX REL. HANS ACKERMANN,
PETITIONER

v.

J. L. O'ROURKE, OFFICER IN CHARGE OF ALIEN INTERNMENT CAMP AT CRYSTAL CITY, TEXAS

No. 585

UNITED STATES EX REL. FRIEDA ACKERMANN,
PETITIONER

v.

J. L. O'ROURKE, OFFICER IN CHARGE OF ALIEN INTERNMENT CAMP AT CRYSTAL CITY, TEXAS

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The judgments of the courts below were entered without opinion (R. (H) 29, 40; R. (F) 4, 12).[1]

[1] Record references to No. 584, the *Hans Ackermann* case, will be indicated R. (H); record references to No. 585, the

JURISDICTION

The judgments of the Circuit Court of Appeals for the Fifth Circuit were entered on November 14, 1947 (R. (H) 41; (F) 13). The petition for writs of certiorari was filed on February 9, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether internment orders, issued by the Attorney General pursuant to Section 21 of the Alien Enemy Act and Presidential Proclamation 2526, against petitioners, German alien enemies, are invalid on the ground that the Attorney General was without power to intern alien enemies resident of and within the continental United States at the time of their apprehension.

STATUTES AND PROCLAMATIONS INVOLVED

The pertinent portions of the Alien Enemy Act and the Presidential Proclamations involved are set forth in the Appendix, *infra*, pp. 12–15.

STATEMENT

Petitioners are native-born Germans who immigrated to the United States in 1925 and have re-

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Frieda Ackermann case, will be indicated R. (F). The cases were tried together on the stipulation that the pleadings, motions, orders, and judgments in each case would be identical (R. (F) 2; Pet. 8–9).

sided since in Texas (R. (H) 2). In June 1938, they became naturalized citizens of the United States (R. (H) 2). On December 7, 1943, the District Court for the Western District of Texas revoked its orders granting petitioners admission to citizenship and cancelled their certificates of citizenship on the ground that these certificates had been procured by fraud (R. (H) 14; *United States* v. *Ackermann et al.*, 53 F. Supp. 611, reversed as to another defendant, 144 F. (2d) 866 (C. C. A. 5)).[2] On April 29, 1944, petitioners were interned by orders of the Attorney General

[2] In the denaturalization proceedings, the court found that, at the time of their naturalization, petitioners had not renounced allegiance to Germany. It was shown that Hans was co-owner and publisher of the Texas Herold, a German-language newspaper; that the paper was the official organ of the Kyffhauser Bund and, for several years prior to petitioners' naturalization proceedings, had maintained a strong pro-Nazi editorial policy; that both petitioners were extremely pro-Nazi and had assisted in the formation of a Bund unit at Taylor, Texas; that both petitioners had visited Germany in 1939 as guests of the German Ministry of Propaganda and Enlightenment; and that the paper customarily reprinted German-published propaganda articles and pamphlets. The court stated that, although there was no direct evidence that petitioners were members of the German-American Bund, the circumstantial evidence was such as to point to a strong allegiance if not a direct connection with that organization. It concluded from all of the "clear, uneqivocal, and convincing" evidence that at the time petitioners swore allegiance to the United States they had not renounced their allegiance to Germany. 53 F. Supp. at 613–616. Petitioners do not now attack that decision, and apparently concede that they are here properly classified as "alien enemies" (Pet. 17, 27, 28).

(R. (H) 12–13; R. (F) 2) and in August, 1945, were served with notices which recited that, on the basis of evidence adduced at former hearings before the Alien Enemy Hearing Board, it was determined that they should be removed and repatriated to the country of their nationality as soon as arrangements for transportation could be made (R. (H) 4).[3]

On May 27, 1946, petitioners applied to the District Court for the Western District of Texas for writs of habeas corpus addressed to the officer in charge of the Alien Internment Camp at Crystal City, Texas, seeking their release from detention (R. (H) 1–8). They alleged that they were being illegally detained in violation of their constitutional rights, and that their contemplated removal was illegal and contrary to the provisions of the Constitution and laws of the United States, natural and international law, and the dictates of humanity (R. (H) 6–7). The writs were issued by the district court on May 27, 1946 (R. (H) 9–10), and the returns made on June 19, 1946 (R. (H) 12–13). Amended returns were made on June 20, 1946 (R. (H) 13–16),[4] and, following

[3] The Department's records show that removal orders were issued on January 15, 1946.

[4] In its amended return, the Government denied that petitioners were being illegally held, asserting that petitioners were German alien enemies and that their internment had been ordered by the Attorney General pursuant to the Alien Enemy Act and the Presidential Proclamations issued thereunder (R. (H) 13–16).

petitioners' answers (R. (H) 17–21),[5] the Government moved for judgments on the pleadings (R. (H) 27–28). On July 31, 1946, the district court granted the Government's motions, dismissed the writs, and entered judgments accordingly (R. (H) 29; R. (F) 4). On appeals by each petitioner the court below affirmed without opinion (R. (H) 40; R. (F) 12).

ARGUMENT

Petitioners do not here challenge the validity of their denaturalization proceedings (see *United States* v. *Ackermann et al.*, 53 F. Supp. 611 (W. D. Tex.), reversed as to another defendant, 144 F. (2d) 866 (C. C. A. 5)), and no claim is made that the Alien Enemy Act or any of the Presidential proclamations or regulations issued pursuant thereto are invalid (Pet. 16–17). While conceding the power of the President to delegate his general authority with respect to the restraint of alien enemies during wartime to the Attorney General, petitioners contend that under Procla-

[5] In their answers petitioners again alleged that they were being illegally detained. They urged that since they had not been denaturalized until a date subsequent to the declaration of war between the United States and Germany the Attorney General lacked the power under Section 21 of the Alien Enemy Act to order their internment (R. (H) 17–18). They further urged that their hearings had been arbitrary, capricious and illegal; that the Attorney General was without power to determine the propriety of their internment; and that they had never been accorded a hearing in any court of the United States (R. (H) 18–21).

mation 2526 (Appendix, *infra*, pp. 13–14), the President did not in fact authorize the Attorney General to determine the propriety of internment or to order the internment of alien enemies actually within the continental United States at the time of their apprehension (Pet. 17). They argue that as to these alien enemies, Proclamation 2526 authorized the Attorney General merely to (1) make arrests, (2) designate places of detention, and (3) prescribe permits for those whom he deemed dangerous to the public safety, and that the power to order internment could be validly exercised only against alien enemies found in the territories and possessions (Pet. 19–24); that the authority of the Attorney General extended only to those alien enemies deemed dangerous to the public safety as distinguished from those deemed "potentially dangerous" (Pet. 21, 23, 27); and that in any event the guarantees of the Fifth Amendment granted them a right to a judicial determination of the propriety of their internment (Pet. 24–26, 27–32).

1. There is no merit to petitioners' argument that Proclamation 2526 (6 Fed. Reg. 6323) did not in fact convey to the Attorney General the power to intern alien enemies resident in the continental United States. Proclamation 2526, applicable to German alien enemies, specifically charged the Attorney General with the duty of executing regulations with regard to the conduct of alien enemies within the continental United

States, and specifically directed him to apprehend such alien enemies as in his judgment were subject to apprehension for deportation under such regulations. It also made applicable to German alien enemies the regulations already issued with regard to Japanese alien enemies and contained in Proclamation 2525 (6 Fed. Reg. 6321). Section 7 of Proclamation 2525 (6 Fed. Reg. 6323) specifically vests in the Attorney General the power to apprehend and intern those alien enemies within the continental United States deemed dangerous [6] to the public safety. See Appendix, *infra*, pp. 14–15. It is thus clear on the face of the Proclamations that the Attorney General was specifically given the power to intern alien enemies residing within the continental United States at the time of their apprehension, a power which has been consistently assumed by every court which has had occasion to consider the question. See *United States ex rel. Zdunic* v. *Uhl*, 137 F. (2d) 858 (C. C. A. 2); *United States ex rel. Schwarzkopf* v. *Uhl*, 137 F. (2d) 898 (C. C. A. 2); *United States ex rel. Umecker* v. *McCoy*, 54 F. Supp. 679 (D. N. D.), affirmed, 144 F. (2d)

[6] The internment orders directed against petitioners recited that they were deemed "potentially dangerous to the public peace and safety of the United States" (R. (H) 12–13). Petitioners seek to find some distinction of significance between "dangerous" and "potentially dangerous," and, from such distinction, argue that the internment orders herein were beyond the Attorney General's authority (Pet. 21, 23, 27). We consider it unnecessary to discuss this contention.

354 (C. C. A. 8); *Citizens Protective League* v. *Clark,* 155 F. (2d) 290 (App. D. C.), certiorari denied, 329 U. S. 787; *United States ex rel. Knauer* v. *Jordan,* 158 F. (2d) 337 (C. C. A. 7), certiorari denied, 331 U. S. 810; *United States ex rel. Schlueter* v. *Watkins,* 67 F. Supp. 556 (S. D. N. Y.), affirmed, 158 F. (2d) 853 (C. C. A. 2); *United States ex rel. Hack* v. *Clark,* 159 F. (2d) 552 (C. C. A. 7). Petitioners' argument to the contrary is based on a confused use of those provisions of the two executive proclamations which grant similar powers to the Secretary of War with regard to alien enemy administration in the Canal Zone, the Hawaiian Islands and the Philippine Islands. Section 7 of Proclamation 2525; Proclamation 2526, Appendix, *infra,* pp. 14–15.

2. Petitioners' second argument is that they possess a right, guaranteed by the Fifth Amendment, to a judicial review of the Attorney General's action in ordering their internment pursuant to the Alien Enemy Act and the related proclamations. This assertion is also without merit. Section 21 of the Alien Enemy Act, Appendix, *infra,* pp. 12–13, authorizes the President to direct "the manner and degree of the restraint to which" "all natives, citizens, denizens, or subjects" of a hostile nation or government shall be subject "whenever there is a declared war between the United States and any foreign nation or government." Pursuant to that statutory

authority, the President, on December 8, 1941, issued Proclamation 2526 in which, as we indicated, he directed the Attorney General to provide for the apprehension and internment of all German alien enemies within the continental United States whom he deemed dangerous to the public safety (Appendix, *infra*, pp. 13–14).

The essence of Section 21 and the implementing proclamations is the plenary and uncontrolled executive power to restrain alien enemies in time of war. Warren, *Supplemental Brief of the United States in Support of the Plenary Power of Congress over Alien Enemies and the Constitutionality of the Alien Enemy Act (Revised Statutes, Sections 4067–4070)*, G. P. O. [1918] pp. 42–43. The vulnerability of alien enemies to executive command during time of war embodies traditional recognition of the "overriding necessities of the power to wage war successfully." *Citizens Protective League* v. *Clark*, 155 F. (2d) 290, 294 (App. D. C.), certiorari denied, 329 U. S. 787. The lack of power in the courts to review internment orders issued under the Alien Enemy Act constitutes a well settled aspect of this broad executive power. *Ex parte Graber*, 247 Fed. 882, 885–887 (N. D. Ala.). Cf. *United States ex rel. Schwarzkopf* v. *Uhl*, 137 F. (2d) at 900; *United States ex rel. Schlueter* v. *Watkins*, 67 F. Supp. at 565; *United States ex rel. Umecker* v. *McCoy*, 54 F. Supp. at 680; *Citizens Protective League* v.

Clark, 155 F. (2d) at 294.[7] Nor can any implication of arbitrariness or irresponsible action arise from the action of Congress in vesting this power exclusively in the executive branch. "Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances. Nothing in this record disturbs such an assumption." *United States* v. *Morgan*, 313 U. S. 409, 421.

The principles set forth in the foregoing cases completely answer petitioners' contention that they were entitled to judicial review of the internment orders here involved. And no different result follows from petitioners' attempted reliance on Sections 23 and 24 (Pet. 24–26), provisions of the statute which have no relevance to this case. "Court jurisdiction, conferred solely by Section 23, arises only when a 'complaint' is filed by a citizen. When the procedure is through executive action, the statute calls for no hearing in court or elsewhere." *United States ex rel.*

[7] Judicial determination can, of course, be obtained on the question of alien enemy status. See *Citizens Protective League* v. *Clark*, 155 F. (2d) at 294. No such jurisdictional question is here involved.

Schlueter v. *Watkins,* 158 F. (2d) at 853; *Minotto* v. *Bradley,* 252 Fed. 600, 604 (N. D. Ill.); *Ex parte Graber,* 247 Fed. 882, 884–5 (N. D. Ala.).

CONCLUSION

The decisions below are correct and there is no conflict. Were it not for the pendency before this Court, in No. 446, *Ahrens* v. *Clark.* of the question of the basic power to control German nationals after the cessation of hostilities but before the termination of the war, we would think it clear that the petition for writs of certiorari in this case should be denied. In view, however, of the pendency of the *Ahrens* case, we think that this Court might appropriately defer disposition of the present petition until after the decision in the *Ahrens* case.

Respectfully submitted.

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APPENDIX

1. The Alien Enemy Act of 1798, as amended, provides:[1]

> SEC. 21. Restraint, regulation and removal.
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> Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are

[1] The section number used is that found in Title 50 of the United States Code.

found necessary in the premises and for the public safety.

2. Presidential Proclamation 2526, 6 F. R. 6323, provides in part:

* * * * *

DUTIES AND AUTHORITY OF THE ATTORNEY GENERAL AND THE SECRETARY OF WAR

And, pursuant to the authority vested in me, I hereby charge the Attorney General with the duty of executing all the regulations hereinafter prescribed regarding the conduct of alien enemies within continental United States, Puerto Rico, the Virgin Islands, and Alaska, and the Secretary of War with the duty of executing the regulations which are hereinafter prescribed and which may be hereafter adopted regarding the conduct of alien enemies in the Canal Zone, the Hawaiian Islands and the Philippine Islands. Each of them is specifically directed to cause the apprehension of such alien enemies as in the judgment of each are subject to apprehension or deportation under such regulations. In carrying out such regulations within the continental United States, Puerto Rico, the Virgin Islands, and Alaska, the Attorney General is authorized to utilize such agents, agencies, officers and departments of the United States and of the several states, territories, dependencies and municipalities thereof and of the District of Columbia as he may select for the purpose. Similarly the Secretary of War in carrying out such regulations in the Canal Zone, the Hawaiian Islands and the Philippine Islands is authorized to use such agents, agencies, officers

and departments of the United States and of the territories, dependencies and municipalities thereof as he may select for the purpose. All such agents, agencies, officers and departments are hereby granted full authority for all acts done by them in the execution of such regulations when acting by direction of the Attorney General or the Secretary of War, as the case may be.

REGULATIONS

The regulations contained in Proclamation No. 2525 of December 7, 1941, relative to natives, citizens, denizens or subjects of Japan are hereby incorporated in and made a part of this proclamation, and shall be applicable to alien enemies defined in this proclamation.

This proclamation and the regulations herein prescribed shall extend and apply to all land and water, continental or insular, in any way within the jurisdiction of the United States.

* * * * *

3. Paragraph 7 of Presidential Proclamation 2525 (6 F. R. 6321, 6323) provides:

(7) Alien enemies deemed dangerous to the public peace or safety of the United States by the Attorney General or the Secretary of War, as the case may be, are subject to summary apprehension. Such apprehension shall be made in the continental United States, Alaska, Puerto Rico and the Virgin Islands by such duly authorized officer of the Department of Justice as the Attorney General may determine. In the Canal Zone, the Hawaiian Islands and the Philippine Islands, such arrests shall be made by the Military Commanders in

each such territory by authority of the respective Military Governors thereof, and if there be no Military Governor, then by authority of the Secretary of War. Alien enemies arrested shall be subject to confinement in such place of detention as may be directed by the officers responsible for the execution of these regulations and for the arrest, detention and internment of alien enemies in each case, or in such other places of detention as may be directed from time to time by the Attorney General, with respect to continental United States, Alaska, Puerto Rico and the Virgin Islands, and by the Secretary of War with respect to the Canal Zone, the Hawaiian Islands and the Philippine Islands, and there confined until he shall have received such permit as the Attorney General or the Secretary of War with respect to the Canal Zone, the Hawaiian Islands and the Philippine Islands shall prescribe.

U. S. GOVERNMENT PRINTING OFFICE: 1940